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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM FONTANA,

Defendant and Appellant.

A152602

(Napa County
Super. Ct. No. CR165936)

In 2014, William Fontana pleaded no contest to a felony charge of driving under the influence causing injury and admitted a prior conviction for driving under the influence. He was granted probation under conditions that prohibited him from using any non-prescribed or illegal substances, including medical marijuana, unless authorized by the court, and required him to complete an outpatient treatment program if so directed by the probation department. In 2017, Fontana admitted that he violated the conditions of his probation by using marijuana and failing to participate in a drug treatment program. In connection with the sentencing on his probation violation, he asked the trial court to allow him to use medical marijuana. The trial court denied the request and Fontana appeals, arguing that the denial is an abuse of discretion under the standards set forth in *People v. Leal* (2012) 210 Cal.App.4th 829 (*Leal*), and that prohibiting his use of medical marijuana is unconstitutionally overbroad. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Underlying Offense and Sentence*

We draw the facts of Fontana's 2014 conviction from the probation department's reports. At about 7:30 on a December evening in 2012, Fontana was involved in a traffic accident with another vehicle. He told a police officer who responded to the scene that he had been driving and was at fault for the collision. Fontana had watery eyes, slow speech and constricted pupils, and admitted that at about 2:00 that afternoon he had smoked marijuana and taken prescription Norco for back pain. He did not perform satisfactorily on field sobriety tests, and a blood draw later that day showed the presence of marijuana, hydrocodone (a component of Norco), and methadone.¹ The driver of the other vehicle suffered a fractured left femur and tibia, which required surgery.

At sentencing, the trial court granted Fontana probation for five years, subject to terms and conditions including these: "Do not use, consume or possess any non-prescribed or illegal substances, including medical marijuana, unless specifically authorized by the Court. Provide the Probation Officer with verification of any prescribed controlled substance within 72 hours of its being prescribed," and "Enroll in, pay for, and successfully complete an outpatient treatment program if required and as chosen by the Probation Officer."

B. *Violation of Probation and Request for Modification*

In March 2017, the probation department filed a petition to revoke Fontana's probation, alleging that from July 2016 through February 2017 Fontana consumed marijuana and refused to follow his probation officer's directive to enroll in an outpatient drug treatment program. Fontana admitted the allegations.

In its June 2017 revocation report, the probation department recommended that probation be revoked and reinstated under the original terms and conditions, and that Fontana serve 90 days in jail.

¹ On our own motion, we take judicial notice that Norco contains the opioid hydrocodone and acetaminophen. (<https://www.drugs.com/norco.html> [as of Jan. 31, 2019].)

The report included a statement from Fontana, who said he suffered from chronic pain for which he wanted permission to use medical marijuana. His treating physician had prescribed narcotic pain medication, but Fontana stopped taking it based on how it made him feel and for fear of developing an addiction. He said he obtained a medical marijuana recommendation and card, and “discovered that using marijuana for pain management, while not entirely as effective as the Norco, made the pain manageable without the side effects.”

In its evaluation, the probation department stated that Fontana “violated his probation agreement by continuously using marijuana and refusing to participate in an outpatient treatment program or enrolling in a cognitive behavioral therapy program as directed by the probation officer. . . . [U]sing marijuana would make [Fontana] ineligible for local treatment programs including the Community Corrections Service Center or Napa County Alcohol and Drug Services, as these programs require complete abstinence from all illegal substances including medical marijuana.”

The department attached to the report medical records that Fontana had submitted to his probation officer, consisting of a medical marijuana card with a September 18, 2012 issue date; pharmacy labels dated November 2016 for two prescribed drugs, one of which is a hydrocodone-acetaminophen combination; and a one-page “Physician’s Statement & Recommendation” regarding medical cannabis from Howard Ragland, M.D., dated May 9, 2016 and expiring May 8, 2017.²

In advance of sentencing, Fontana’s counsel provided the court with additional medical records,³ as well as articles about the medical use of marijuana, and an August 8, 2017 letter from Frank H. Lucido, M.D. Dr. Lucido wrote, “Mr. William Fontana is

² According to the statement, Fontana had “undergone an evaluation” with Dr. Ragland, who “acts only as a consultant and not a primary care provider.” Dr. Ragland recommended that Fontana qualifies for the use of cannabis for medical purposes, and opined, “[t]he number of plants and ounces of marijuana which meets the patient’s medical need is 6 plants, 8 ounces.”

³ The trial court judge stated that he had reviewed these medical records, but they are not included in the record on appeal.

under my care for cannabis consultation. I evaluated him on 8/8/17 and gave him a cannabis recommendation valid for one year for chronic pain due to bilateral carpal tunnel syndrome, cubital tunnel syndrome, and lumbrosacral back disease, after determining that it helped his pain 60-75%, with no unfavorable side effects. With using cannabis for medical purposes, he has been able to discontinue hydrocodone (an opiate), Klonopin, and Ativan (two tranquilizers which had been prescribed by previous physicians for depression and anxiety.” Dr. Lucido opined that “it would require at least 2 other prescription drugs to attempt to ameliorate [Fontana’s] symptoms, and would be unlikely to help as effectively as cannabis, and most of which have unfavorable negative side effects. Denying Mr. Fontana his ability to use medical cannabis would negatively impact his health and potentially result in being prescribed more dangerous drugs, that are less effective.”

At the sentencing hearing in September 2017, the district attorney argued against allowing Fontana to use medical marijuana: “[T]his is a driving under influence with injury case that was the result of the defendant’s marijuana, Norco and Methadone use. This was a head-on collision, and caused significant injuries to the victim. [¶] Some of the records that have been provided to the Court, the . . . clinical visit notes, include reports that reference a diagnosis of marijuana dependency . . . in the summary of the visit. . . . I wanted to bring that to the Court’s attention, along with an alcohol abuse unspecified diagnosis. [¶] Probation is not in support of his use of marijuana. They have been working to get him in treatment for almost a full year. And one of the largest issues is the treatment program will not allow for the use of medical marijuana, prevents him from engaging in the treatment that is required by his probation” The district attorney reported that Dr. Ragland, who first recommended marijuana for Fontana, “has had disciplinary proceedings from the medical boards of California for his prescribing marijuana. I can provide a copy to the Court and let counsel take a look at it, but it summarizes undercover investigation for patients for approximately 30 checks no physical exams were taken.” The district attorney noted that although Fontana had submitted a new letter from a doctor, “during the collision he was self treating with

Methadone, mushrooms for depression, and marijuana for depression, pain. This was all self prescribed.”

Fontana’s counsel argued that Dr. Lucido was “a perfectly legitimate physician who treats patients,” and further argued that “the only evidence before the Court on this issue is that marijuana is being prescribed, that it is a legitimate medication for controlling pain,” and that Fontana was in need of pain management.

The court revoked and reinstated Fontana’s probation, with the additional requirement that Fontana serve 30 days in county jail, and reduced the term of probation from five years to four. But the court denied Fontana’s request to allow the use of medical marijuana, “based on the fact that it was involved in the underlying offense.” The court explained, “The problem, Mr. Fontana, frankly, for me, is that number one, that the offense, the driving under the influence with injury, as the case where you were found to be under the influence in part was marijuana. And I’m being asked to allow you to use marijuana when that’s your committing offense. [¶] The other issue I have is because you have never been able to be engaged in treatment, and I recognize your desire to control how you go about this, but the bottom line is you’re on felony probation, subjected to supervision of a probation officer and the court. And while I’m certainly sympathetic, and empathetic to your pain issues, these issues are also issues that a lot of people deal with without heavy narcotics, and other options.”

Fontana timely appealed, challenging only the denial of his request to modify the conditions of his probation to permit him to use medical marijuana.

DISCUSSION

A. *Applicable Law*

“In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*)). “ ‘The court may impose and require . . . [such] reasonable conditions[] as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and

specifically for the reformation and rehabilitation of the probationer.’ (Pen. Code, § 1203, subd. (j).) The trial court’s discretion, although broad, nevertheless is not without limits: a condition of probation must serve a purpose specified in the statute. In addition, we have interpreted Penal Code section 1203.1 to require that probation conditions which regulate conduct ‘not itself criminal’ be ‘reasonably related to the crime of which the defendant was convicted or to future criminality.’ (*People v. Lent* [(1975)] 15 Cal.3d [481,] 486 [(*Lent*)).) As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or ‘ “ ‘exceeds the bounds of reason, all of the circumstances being considered.’ ” [Citations.]’ (*People v. Welch* [(1993)] 5 Cal.4th [228,] 233.)” (*Carbajal* at p. 1121.)

In *Leal*, this court applied a three-step inquiry in evaluating a probationer’s challenge to a probation condition that limited the possession and use of medical marijuana, otherwise permitted by the Compassionate Use Act (CUA, Health & Saf. Code, § 11362.5). (*Leal, supra*, 210 Cal.App.4th at p. 837.) The *Leal* inquiry incorporates and expands upon the standard set forth in *Lent, supra*, 15 Cal.3d 481: “First, we examine the validity of any CUA authorization; second, we apply the threshold *Lent* test for interfering with such authorization; and third, we consider competing policies governing the exercise of discretion to restrict CUA use.” (*Leal, supra*, 210 Cal.App.4th at p. 837.) The third step requires balancing the “policy that qualified patients be allowed to alleviate medical problems through the use of marijuana” (*id.* at p. 844), and the policy to “rehabilitate the defendant and protect the public during his or her release on probation.” (*Ibid.*) This step “contemplates a judicial assessment of medical need and efficacy based upon evidence: the defendant’s medical history, the gravity of his or her ailment, the testimony of experts or otherwise qualified witnesses, conventional credibility assessments, the drawing of inferences, and perhaps even medical opinion at odds with that of the defendant’s authorizing physician.” (*Ibid.*)

B. *Analysis*

We begin with Fontana’s argument that the trial court abused its discretion in prohibiting his use of medical marijuana. The first two inquiries under *Leal* are quickly

addressed. (*Leal, supra*, 210 Cal.App.4th at p. 837.) First, there is no dispute that Fontana has a valid cannabis recommendation from Dr. Lucido. Second, because marijuana was involved in Fontana's offense, the prohibition regulates conduct reasonably related to the crime of which Fontana was convicted and therefore the prohibition is not made impermissible under *Lent*. (*Lent, supra*, 15 Cal.3d at p. 486.)

We focus on the third *Leal* inquiry, which requires the trial court to evaluate the evidence and balance the competing need to allow the use of marijuana to alleviate medical problems and the need to rehabilitate the defendant and protect the public during a defendant's release on probation. (*Leal, supra*, 210 Cal.App.4th at p. 844.) As to the medical need, there is evidence from Fontana's statements and Dr. Lucido's letter that marijuana helped Fontana's chronic pain, had no unfavorable side effects, and enabled him to discontinue use of three medications, one that had been prescribed for pain and two for depression and anxiety. Dr. Lucido's letter provides evidence that the medical literature supports the use of cannabis to treat chronic pain, and that he recommended Fontana use cannabis as medication for chronic pain. Thus there is ample evidence to show Fontana's medical need for marijuana.⁴

But there is also ample evidence of the need to prohibit the use of marijuana to promote Fontana's rehabilitation and the public's protection. Fontana was on probation for the offense of driving under the influence causing injury, and marijuana was among the substances in his system at the time. He had admitted a previous conviction for driving under the influence, and was driving with a suspended license.

When Fontana was first placed on probation, the court ordered him to participate in a drug treatment program if required by probation as part of his rehabilitation, a condition that Fontana never challenged and that is not at issue in this appeal. The probation reports established Fontana had a history of using alcohol and illegal drugs. He had used marijuana for more than 30 years and had made inconsistent statements about

⁴ There was no evidence in the record regarding the use of opiates for pain management, except Fontana's statement that they were more effective than marijuana but had undesirable side effects.

that use. At the time of his offense in 2012, he was apparently self-medicating with marijuana, Methadone and mushrooms, and using prescription Norco, which was first prescribed for him in about 2007. Near the time of his original sentencing in 2014, Fontana was evaluated as having a very high risk of reoffending, and among the areas of concern was “Alcohol/Drug Problem.” In 2014, he told the probation department he would, and could, wean himself from marijuana without treatment so that he could use Norco. Later, he decided he preferred marijuana to Norco. He had apparently sought to justify his use of marijuana as medicinal for at least five years before he obtained a recommendation from a reputable physician.

Although an assessment in connection with his 2014 sentencing showed that Fontana could benefit from outpatient drug and alcohol treatment, Fontana denied any need for treatment. A subsequent assessment in 2016 showed Fontana needed outpatient drug and alcohol treatment, and the probation department directed Fontana to participate, yet he repeatedly refused to sign the intake documents or participate in the program. The probation department reported that Fontana “stated that he will not stop using marijuana and shows a lack of desire to attend a treatment program as directed.”

The unrebutted information before the trial court on this issue was that Fontana had been directed to participate in a treatment program and had declined to do so, and that the use of marijuana made Fontana ineligible for local treatment programs, including two that the probation department identified by name.⁵

On this record, we cannot say that the trial court acted arbitrarily or capriciously in determining that the interest in rehabilitating Fontana, which included his participation in

⁵ On appeal, Fontana suggests for the first time that he could have engaged in drug and alcohol treatment while using medical marijuana, relying on an appellate opinion (*People v. Beaty* (2010) 181 Cal.App.4th 644), but not evidence. In any event, *Beaty* is inapposite: it held that the authorized use of medical marijuana does not in itself justify a finding that a defendant is not amenable to drug treatment under Proposition 36, which applies to defendants convicted of simple drug possession, and which is not at issue here. (*Id.* at pp. 653, 656.) Proposition 36 is codified in Penal Code sections 1210, 1210.1, 3063.1 and Health and Safety Code section 11999.4 et seq. (*Beaty* at p. 649, fn. 1.)

a drug treatment program, and the interest in protecting the public during his release on probation, outweighed the interest in allowing him to use marijuana to manage his chronic pain for the remaining period of his probation. (See *Carbajal, supra*, 10 Cal.4th at p. 1121.) Even if a reasonable judge could have reached a different determination, the trial court’s determination here does not exceed the bounds of reason. (See *ibid.*)

Having concluded that the condition prohibiting the use of medical marijuana withstands Fontana’s *Leal* challenge, we turn to his argument that the condition is overbroad in its infringement of his constitutional right to privacy. Fontana cites no authority to support his claim that he has a constitutional right of privacy to use medical marijuana, but even if we assumed he had that right, he has forfeited the argument by failing to raise it below. A constitutional challenge to a probation condition as overbroad can be raised for the first time on appeal if the challenge presents “ ‘pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court.’ ” (In re *Sheena K.* (2007) 40 Cal.4th 875, 889, quoting *People v. Welch, supra*, 5 Cal.4th at p. 235.) Fontana’s constitutional argument is essentially a restatement of his *Leal* argument, which in turn relies on the sentencing record. This reliance prevents him from raising his constitutional overbreadth challenge for the first time on appeal. (*Sheena K., supra*, 40 Cal.4th at p. 889.)

DISPOSITION

The order appealed from is affirmed.

Miller, J.

We concur:

Richman, Acting P.J.

Stewart, J.

A152602, *People v. Fontana*